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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

TRACY CHAPMAN,

Plaintiff,

vs.

ONIKA TANYA MARAJ p/k/a NICKI MINAJ and DOES 1-10,

Defendants.

Case No. 2:18-cv-9088-VAP-SS

DEFENDANT MARAJ'S NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed Concurrently with Separate Statement of Undisputed Facts; Declaration of Eric C. Lauritsen; and Proposed Order in Support Thereof]

Judge: Hon. Virginia A. Phillips
Date: September 14, 2020
Time: 2:00 pm
Crtrm.: 8A

Date Filed:	October 22, 2018
Disc. Cutoff:	July 29, 2020
FPC:	October 5, 2020
Trial Date:	October 13, 2020

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 14, 2020 at 2:00 pm, or as soon thereafter as the matter may be heard, in Courtroom 8A of the above-titled Court, located at 350 West First Street, Los Angeles, CA 90012, the Honorable Virginia Phillips, judge presiding, defendant Onika Tanya Maraj, professionally known as "Nicki Minaj" ("Minaj") will, and hereby does, move this Court to enter partial summary judgment in her favor.

This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there is no genuine dispute of material fact and Minaj is entitled to judgment as a matter of law as to one of the theories asserted by plaintiff in support of her claim of copyright infringement. Specifically, Minaj's activities in connection with the making of the recording at issue were non-infringing as a matter of law.

The motion is based on this notice of motion, the accompanying memorandum of points and authorities, the separately filed statement of undisputed facts, declaration of Eric C. Lauritsen and exhibits, and proposed judgment, as well as any other evidence and argument considered by the Court at the time of the hearing.

This motion is made following a Rule 7-3 conference of counsel that occurred on July 29, 2020.

DATED: August 17, 2020

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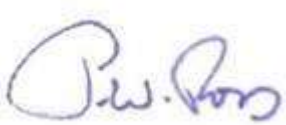
Peter W. Ross
Eric C. Lauritsen

By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court's decision on this motion will have a significant impact on the music recording industry, one way or the other. Right now, the recording industry works in a way that is straightforward, flexible, and practical. A recording artist works out a new arrangement of an existing song, or maybe transforms it from "rock" (for example, the Eagles' *Boys of Summer*) to "pop punk" (as did the Artaris with their version of that same song). Or maybe the recording artist creates a "scat jazz" version of the George Gershwin classic *Summertime*, as did Billy Stewart. Or perhaps the recording artist puts the song into a medley. Such free-flowing creativity is important to all recording artists but particularly in hip hop. With that category of music, a recording artist typically goes into the studio and experiments with dozens of different "beats" or snippets of melodies, before hitting upon a pleasing combination.

And in the process of creation, no one approaches the original songwriter (the "rights holder") for a license *to experiment*. The musicians just experiment. If something works, and the recording artist wants to release the song commercially, *then* the record label, managers, and attorneys get involved and seek the required permission. If it is granted, the recording is commercially released. If permission is denied, the recording is discarded; no one is harmed; and the experimentation begins anew. Recording artists require this freedom to experiment, and rights holders appreciate the protocol as well. Often, the rights holder does not want to simply approve a use in the abstract – i.e., "any hip hop version of your song". The rights holder wants to hear the actual version before giving her permission.

The plaintiff here, Tracy Chapman, wants to turn this process on its head. She alleges that defendant Onika Maraj, professionally known as Nicki Minaj, infringed Chapman's copyright in *Baby Can I Hold You*, merely by recording a hip hop version *in the studio* – a version that was used solely to seek Chapman's

permission to release the song commercially (the "demo version"). (Chapman alleges that Minaj also infringed Chapman's copyright by leaking the demo version to a New York radio host, who broadcast the recording on his show. This motion, however, does not address those separate allegations. The motion is concerned solely with the recording of the demo version.) For those reasons expressed below, the creation of the demo version alone should be considered fair use, and this Court should grant Minaj summary judgment against the claim that it infringed Chapman's copyright.

II. STATEMENT OF FACTS

Minaj is a world famous recording artist and entertainer. SUF 1. In 2017, a fellow artist, known professionally as "Nas," asked Minaj to record vocals for a new track, on which he was working. SUF 2. Nas told Minaj that the new track would incorporate lyrics and melodic elements from a pre-existing composition entitled *Sorry* – a song that Minaj knew well and believed to have been written and performed by an artist known as "Shelly Thunder". And indeed, years earlier, Thunder had released a well-received reggae version of the song. SUF 3. At the time of her conversation with Nas, Minaj of course could not possibly have known whether the proposed collaboration with him would lead to commercial success. SUF 4. She agreed, however, to work with him and see where the project went. SUF 5.

Minaj understood that her recording with Nas was not to be a true "cover" of *Sorry*; the new track would include new lyrics and melodies, that would intertwine with the original ones.[1] Consequently, Minaj also understood that, at some point, if she or Nas desired to release the song commercially, her management would have to seek the necessary clearances. SUF 6. However, in accordance with well-established industry practices, no effort was to be made to obtain clearances until the

[1] "Covers," which do not alter the basic melody or fundamental character of pre-existing compositions, are subject to compulsory licenses under the Copyright Act.

song was recorded and a decision had been made to include the song, if possible, on Minaj's new album *Queen*. SUF 7. Here is Minaj's testimony on the subject:

> "Q: Did you discuss Shelly Thunder in relation to your song 'Sorry'?
> A: With people in general, yes.
> Q: And do you recall any specific conversation with anybody?
> A: I remember – I don't remember who I was speaking to, but I remember it was about this. And I remember saying that this whole time – like, for the last, I don't know, 20-plus years or however long this song was out, that I always thought Shelly Thunder was the original composer of the song. I never knew that she re-made someone else's song. So going into it, I just thought that, okay, I'm redoing the Shelly Thunder song for my album *and we have to get approval from Shelly Thunder*." (emphasis added)

(*Id.*)

Proceeding in this fashion – creating a demo recording first and seeking clearances second – has many advantages. It allows for ready experimentation with different beats and melodies; it avoids the expense of seeking and paying for clearances for songs the artist would never use; and it enables her to provide an actual specimen of the song to the rights holder for approval. In fact, rights holders commonly request specimens before giving approval. SUF 8. Notably, plaintiff Tracy Chapman herself has been known to make such requests; for example, in an email she sent to her business manager regarding a request to reprint some of her lyrics in a Swedish textbook, she states, "To give this proper consideration, I would need to see the table of contents for the book and a copy of the chapter that includes the song lyrics." SUF 9. Prospective licensees anticipate these needs, so the

licensees almost always include their proposed derivative works with their initial licensing requests. SUF 10.

Eventually, Minaj's *Sorry* remake was selected for inclusion on her album *Queen*. Minaj's representatives then sought the necessary approvals. SUF 11. These efforts led to Chapman. (Thunder's *Sorry* was, as matters turned out, a cover of Chapman's *Baby Can I Hold You*.) SUF 12. Chapman repeatedly rebuffed clearance requests from Minaj's team. SUF 13. As a result, Minaj herself joined in the efforts, posting a tweet stating, "Tracy Chapman, can you please hit me. ♀ omg for the love of #Queen." SUF 14. Chapman did not change her mind. SUF 15. *Sorry* was scrapped, and Minaj released *Queen* without it. SUF 16.

The following day, a New York radio host somehow obtained a copy of the unreleased demo recording of Minaj's *Sorry* and played it on the radio. Chapman filed the present suit shortly thereafter. She alleges that Minaj infringed Chapman's copyright in *Baby Can I Hold You*, both (i) by leaking the demo recording to the New York radio host and (ii) by recording the demo in the first place. The instant motion challenges the legal viability of the second claim only.

III. STANDARDS THAT GOVERN THIS MOTION

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, a party may move for summary judgment on a claim or defense, or merely *part* of a claim or defense. *See Boston Scientific Corp. v. Cordis Corp.*, 422 F. Supp. 2d 1102, 1106 (N.D. Cal. 2006) ("[I]nherent in Rule 56 is authority of the District Court to grant partial summary judgment, *i.e.*, on a particular claim or a particular affirmative defense . . ."); *Continental Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519 (9th Cir. 1987) (affirming award of partial summary judgment). Summary judgment should be granted if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When the moving party satisfies its burden of demonstrating the absence of a genuine issue of fact for trial, the opposing party must "do more than simply show that there is some

metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, it must "come forward with enough evidence to support a jury verdict in its favor." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The fair use of a copyrighted work is considered non-infringing. 17 U.S.C. § 107. Fair use is a mixed question of law and fact, and it is usually adjudicated either at trial or, where no material facts are in dispute, at summary judgment. *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 530 (9th Cir. 2008).

IV. CREATION OF THE DEMO RECORDING WAS A NON-INFRINGING "FAIR USE"

A. The Law of Fair Use

The fair use statute, 17 U.S.C. section 107, provides in pertinent part:

> . . . the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The courts have emphasized that factors one and four are the most important. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1171 (9th Cir. 2012) ("The relative importance of factor one . . . and factor four . . . has dominated the case law").

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B. Factors One and Four Weigh Heavily Here in Favor of Finding Fair Use

1. The Purpose and Character of the Use

The first of the two important factors is the "purpose and character of the use." Here, the use is: putting together a demo recording that both (i) experiments with the performer's artistic vision and (ii) fixes that vision in a concrete form that can be submitted to the rights holder for approval.

At deposition, Minaj described the process of artistic experimentation:

> "Q: And how did it come to be that you were recording 'Sorry'? How did the song come together?
>
> A: I was in New York, and I went to the studio where Nas records, and he played a beat. And he said, 'I want to cut this song with you. I want us to re-make the 'Sorry' song.' And I asked him to – to give me an idea of how he heard it being done. And he referenced it with his voice. And I said, 'Okay. Well, when I go back to L.A., I'll cut it and I'll, you know, let you know if I like it and, you know, we'll take it from there.' And he agreed."

The whole purpose of the Copyright Act is to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *United States Const., Art. I, Sec. 8, Clause 8.* We are "promoting" the "Arts". We are encouraging creativity for the public good. To do so, we ought to interpret "fair use" in a way that encourages artistic expression. For this reason, in the privacy of their homes or studios, artists should be free to experiment with copyrighted musical works and come up with new interpretations, arrangements, versions, that may be of interest to the public at large. Indeed, creativity would be stifled, were artists required seek and pay for a license before even experimenting with a work, to determine whether

some new and interesting version could be cobbled together. Particularly in hip hop, an artist may experiment with dozens of different beats and melodies before hitting upon a pleasing combination. A young and upcoming artist may not even have the resources to negotiate and pay for licenses to experiment with songs he may never use.

Moreover, as noted above, a second purpose of the demo recording was to facilitate the approval process. Most rights holders request a demo. (SUF 8.) They want to see or hear exactly how the work will be used. (*Id.*) Indeed, as testified by Deborah Mannis Gardner, an experienced music industry executive, it is standard practice to include a demo recording with a license request. (SUF 10.) According to Mannis Gardner, the demo is included "*99 percent of the time*." (*Id.*, emphasis added). Even Chapman must recognize the utility of this practice. She herself has requested to review a demo before giving approval. (SUF 9.)

The courts have recognized that the utility of a purpose is an important factor in evaluating whether it constitutes "fair use". *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007) (considering utilitarian value of defendant's purposes in creating allegedly infringing work in finding a defendant's use to be fair). That factor weighs heavily in favor of finding fair use here.

2. <u>The Effect of the Use on the Potential Market for or Value of the Copyrighted Work</u>

The other important factor in evaluating fair use under section 107, the fourth factor, is "the effect of the use upon the market for or value of the copyrighted work." 17 U.S.C. § 107(4). Of course, the creation of a derivative work for the limited, private purposes of artistic experimentation or securing the copyright owner's consent for broader distribution has precisely zero impact on the commercial market for the original work. *See generally Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1107 (C.D. Cal. 2015) ("The only kind of harm [with which the fourth fair use factor is concerned] is market substitution—i.e.

where the new work diminishes demand for the original work by acting as a substitute for it"). Thus, this factor as well weighs heavily in favor of finding fair use.

C. The Second and Third "Fair Use" Factors are of Little Relevance Here

The second and third factors are "the nature of the copyrighted work," and "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. §§ 107(2) and (3). Neither factor, however, is of any significance here. The work is a musical composition, and much of it was used. These facts neither add to, nor detract from, the real inquiry: do we want to encourage experimentation and musical expression, and does a demo recording actually facilitate, not hinder, the licensing process?

V. CONCLUSION

At bottom, and to be frank, the notion that Minaj's use of Chapman's work for the purposes described herein would constitute a violation of Chapman's rights—or, relatedly, that it would be necessary to obtain a license from her in advance of these uses—should send a shiver down the spine of those concerned with the entertainment industry. Such a rule would impose a financial and administrative burden so early in the creative process that all but the most well-funded creators would be forced to abandon their visions at the outset. The resulting deprivation to the public of the benefit of the art that would not be created could hardly be what the framers had in mind when they drafted a constitutional provision designed "to promote the progress of science and useful arts." U.S. Constitution, Art. I., sec. 8, cl. 8. Fortunately, for the reasons described above, such a rule is not legally justified. Minaj respectfully requests that the Court enter summary judgment in her favor as to Chapman's theory that the making of the *Sorry* recording violated her copyright in *Baby Can I Hold You*.

DATED: August 17, 2020

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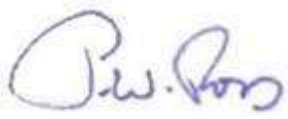
By: 
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